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In The
Supreme Court of the United States

METRO-GOLDWYN-MAYER STUDIOS, INC., *et al.*,

Petitioners,

v.

GROKSTER, LTD., *et al.*,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF THE CONSUMER FEDERATION OF AMERICA, CONSUMERS UNION, FREE PRESS AND PUBLIC KNOWLEDGE AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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STATEMENT OF INTEREST OF *AMICI CURIAE*[1]

This brief *amici curiae* is submitted by the Consumer Federation of America, Consumers Union, Free Press and Public Knowledge ("*Amici*") pursuant to Rule 37 of the Rules of this court. *Amici* urge that the Court affirm the decision of the United States Court of Appeals for the Ninth Circuit. *Amici* do not issue shares to the public and have no parent corporations that issue shares to the public.

The Consumer Federation of America is the nation's largest consumer advocacy group, composed of two hundred and eighty state and local affiliates with more than fifty million individual members.

Consumers Union, publishers of *Consumer Reports*, is an independent, nonprofit testing and information organization serving only consumers.

Free Press is a national, non-partisan organization working to increase informed public participation in crucial media policy debates, and to generate policies that will produce a more competitive and public interest-oriented media system with a strong non-profit and commercial sector.

Public Knowledge is a public-interest advocacy and education organization that promotes a balanced approach to intellectual property law and technology policy, reflecting the "cultural bargain" intended by the framers of the U.S. Constitution. PK promotes the fundamental values of openness, access and the capacity to create and compete.

Amici's members and the public at large have benefited from the innovative technologies that have developed

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[1] Letters from all parties consenting to the filing of *amicus* briefs have been filed with the Clerk of this Court. No counsel for a party authored this brief in whole or in part, and no person or entity other than *amici curiae*, or their counsel, made a monetary contribution to the preparation or submission of this brief. Scott Albright, Thomas R. Burns Jr., Traci Hale and Elaine Tran, students at the Washington College of Law, Glushko-Samuelson Intellectual Property Law Clinic, helped to prepare this brief under the supervision of Joshua Sarnoff and Peter Jaszi.

under the standard for secondary liability articulated by this Court in *Sony Corp. of America v. Universal City Studios, Inc.*, 464 U.S. 417, 432 (1984) ("*Sony*").

SUMMARY OF ARGUMENT

In this unprecedented effort to harness copyright law to regulate multi-purpose information technology, rather than technology use, Petitioners and their supporting *amici* seek to reverse the core principle restated by this Court in *Sony*. This venerable rule of general applicability, dating back to the first British and U.S. copyright statutes, has benefited the pubic by creating the legal conditions for rapid, widely accessible innovations in information and communications technology. Although patent law may have a role to play in regulating technology, copyright does not. This Court should decline the invitation to graft the patent doctrine of "active inducement" into copyright, as well as to adopt other proposals that would reduce the salutary clarity that the *Sony* principle now affords. The *Sony* principle has seen the copyright system through a series of "technology panics." If left undisturbed, it will continue to fulfill this important function of promoting technology. The costs of abandoning the *Sony* principle are high and certain, while the benefits are slight or illusory.

ARGUMENT

I. This Case Raises Fundamental Questions About the Proper Relationship of Law and Technology, Which Strongly Implicate the Public Interest in Access to Information

Petitioners and numerous *amici curiae* ask this Court to revisit the issue of when the risk that technology users will violate the law should be met by imposing liability and/or design constraints on technology providers. But the law in question is not just any law; rather, it is the law of copyright, which this Court recently noted has an intimate

connection to the cherished constitutional values of free expression.[2] Nor are the technologies involved ordinary ones. Rather they are what de Sola Pool memorably dubbed the "technologies of freedom"[3] the media by means of which members of free societies communicate and extend knowledge from print to the Internet, which "enables tens of millions of people to communicate with one another and to access vast amounts of information from around the world. [It] is 'a unique and wholly new medium of worldwide human communication.'" *Reno v. ACLU*, 521 U.S. 844, 850 (1997) (citations omitted). In particular, the World Wide Web is "comparable . . . to both a vast library including millions of readily available and indexed publications and a sprawling mall offering goods and services." *Id.* at 853. As it did twenty years ago, this Court now faces a situation in which "major technological innovations alter the market for copyrighted materials." *Sony*, 464 U.S. at 432 (1984). As it did then, it should proceed now with caution and circumspection.

This is also a dispute about striking the proper relationship between the private and public spheres. It raises profound questions about how far our society should go in projecting state-conferred and constitutionally limited private monopolies into public fora where citizens rely on information and communications technology to enable personal expressive freedom.

II. This Case Puts at Risk the Salutary Approach to Regulation Introduced in Response to the First "Technology Of Freedom"

The law has not always been fastidious in distinguishing between information technology itself and technology use as objects of regulation. In England, before the invention of copyright, powerful interests sought control over technology

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[2] *Eldred v. Ashcroft*, 537 U.S. 186, 219 (2003).

[3] *See generally* Ithiel de Sola Pool, *Technologies of Freedom: On Free Speech In An Electronic Age* (1983).

to perpetuate their private monopoly power over book production, and law often operated in ways that were inimical to society's interest in free expression. Faced with the spread of the disruptive technology of movable type, the London-based publishers' guild cemented a deal with the state in which it obtained a collective monopoly in exchange for the obligation to police the unruly printing trade. In carrying out that obligation, the guild put a special emphasis on controlling the means of book production:

> By the early seventeenth century the Stationers' Company had become the English state's principal enforcement authority. It was given power to limit the numbers of printing presses and the amount of types which could be manufactured .... Their officials carried out frequent searches in printing houses, shops and ships for books that infringed state textual controls, state-conferred monopoly franchises, and private intellectual property conventions. They had powers to fine members and non-members, to arrest apprentices who left their masters, to destroy types and presses, to imprison alleged offenders without trial, and to obtain the severest penalties from the courts, including death, for some publishing offences.[4]

In effect, the Stationers' Company exercised its delegated authority to check the spread of innovative information technology for the benefit of its members but to the detriment of readers, the "information consumers" of the day.

A. The Statute of Anne introduced the principle that copyright should regulate technology use, not technology

The parliament responded to this overt censorship of printing technology by rescinding the Stationers' collective monopoly. When it took effect in 1710, the first copyright

[4] William St Clair, *The Reading Nation in the Romantic Period* 61-72 (2004) (footnotes omitted).

statute ushered in a fundamentally new approach to the regulation of information production, fueled in part by the distrust of monopoly power characteristic of the early eighteenth century.[5] Like every copyright law that was to follow in Great Britain and the United States, the Statute of Anne focused regulatory authority on the *users* of information technologies rather than on the technologies themselves.[6] In the decades and centuries that followed, access to (and distribution of) print technology and consequently of printed works increased dramatically. Book prices fell, and a wider variety of books became available. The ultimate beneficiaries of these trends were the members of the reading public.[7] The Statute of Anne was understood then and since as a necessity to protect political expression, as communications technology was and remains integral to the public's ability to engage in political speech.

B. Despite wide-spread and well-known piracy, eighteenth and nineteenth century copyright owners fought to establish authority over the misuse of print, rather than to limit the technology's dissemination

The "technology panic" that framed the leading case of *Donaldson v. Becket*, 98 Eng. Rep. 257 (H.L. 1774),[8] illustrates how the early copyright system focused on regulating technology users rather than the means of communication. In the mid-eighteenth century, book "piracy" was a matter of widespread concern among London-based publishers and

[5] *See* L. Ray Patterson, *Copyright in Historical Perspective* 83-90 (1968).

[6] *See generally* Craig Joyce & L. Ray Patterson, *Copyright in 1791*, 52 Emory L.J. 909 (2003).

[7] *See* Richard D. Altick, *Writers, Readers & Occasions* 209-30 (1989) (discussing reading publics in England and America).

[8] The case is discussed in Ronan Deazley, *On the Origin of the Right to Copy: Charting the Movement of Copyright Law in Eighteenth-Century Britain* (1695-1775) (2004).

authors.[9] It was generally believed that new firms (especially in the North of England and Scotland) were abusing increasingly accessible print technology by pirating books to which established publishers claimed perpetual rights under the "common law" of copyright (the specific issue on which the House of Lords ultimately ruled for the upstart Donaldson), or violating limited statutory rights granted by Parliament. But nowhere in the discourse around book piracy in this period does one find any serious assertion that the technology itself (or those who provided it to printers and publishers of all kinds) should be subjected to legal controls. Had such a view prevailed, the fate of this critical "technology of freedom" – and of all those that were to follow – would have been in doubt.

C. Access to technology is necessary if American consumers are to benefit from social, economic and cultural progress

The First Amendment is based on the implicit premise that freedom of speech is best fostered by a bustling and vibrant marketplace of ideas. As vendors have moved from the soap box to podcasting, from UHF to HDTV, and from dittos to digital scanning, technological innovation has consistently extended that marketplace to such indispensable realities as improved education, greater entrepreneurial efficiency and enriched artistic expression.

Consistent with free-speech ideals, technological innovation historically has progressed via the mechanism of consumer access leading to grass roots quality control and "R&D." As reflected in important fair use decisions such as *Sega Enterprises Ltd. v. Accolade, Inc.*, 977 F.2d 1510 (9th Cir. 1992), technological innovation often originates in minds freshly exposed to the work of others. In addition, a

[9] *See* John Feather, *Publishing, Piracy and Politics: An Historical Study of Copyright in Britain* 68-85 (1994); *id.* at 81 (observing that "by the late 1730's, Scottish booksellers and printers were beginning to flout the law and justify their actions on patriotic grounds").

technology's original producers often only become aware of improvements after consumers test their products.[10]

Greater access to technology also has had the socially desirable effect of expanding the market to which entrepreneurs might cater. Correspondingly, the competition to obtain greater shares of a growing market leads to more efficient distribution of resources and to incentives for improving existing technologies and services.[11]

D. The principle that has secured the value of new technologies to the public is now at risk

Throughout the history of copyright, despite a series of "technology panics" characterized by fears that new modes of reproduction and communication might undermine the structure of incentives embedded in the copyright laws, courts have held firm to the core principle of the Statute of Anne: that copyright should regulate the users of technology rather than technology itself. In this case, Petitioners and *amici* supporting them have called that principle into question – and with it the benefits that copyright has generated for information consumers over almost three centuries.

III. This Court's Holding in *Sony* Reaffirms the Principle That Assures Broad Access to Technology by Restating Prevailing Law on Secondary Infringement Liability

The *Sony* principle restates the historic disengagement of copyright law from technology regulation. Behind the principle is the same policy implicated in the British legislation of 1709 and the United States Copyright Act of

[10] *See generally* Mark Cooper, *Open Communications Platforms: The Physical Infrastructure as the Bedrock of Innovation and Democratic Discourse in the Internet Age*, 2 J. Telecomm. & High Tech. L. 177, 188 (2004).

[11] *Id.* at 189.

1790: The scope of the copyright monopoly is to be restricted to preserve "the rights of others freely to engage in substantially unrelated areas of commerce." *Sony*, 464 U.S. at 442.[12] And, as the opinion subsequently makes clear, this principle is of special importance where clear future benefits will flow to information users if the challenged technology is not enjoined.[13]

From the 1790's to the 1980's, even as the judge-made law of secondary liability for copyright infringement burgeoned in the courts of the United States,[14] no reported case involved a copyright owner's challenge to a technology designed to facilitate the recording or exchange of information. Thus, early in his opinion in *Sony*, Justice Stevens could characterize the copyright owner plaintiffs' "attempt to impose copyright liability upon the distributors of copying equipment" as literally "unprecedented." 464 U.S. at 421.[15]

[12] *See* 464 U.S. at 441 n.21: "It seems extraordinary to suggest that the Copyright Act confers upon all copyright owners collectively . . . the exclusive right to distribute VTR's simply because they may be used to infringe copyrights. . . . [R]espondents seek, in effect, to declare VTR's contraband."

[13] *See, e.g., id.* at 446: "If there are millions of owners of VTR's who make copies of televised sports events, religious broadcasts, and educational programs such as Mr. Rogers' Neighborhood, and if the proprietors of those programs welcome the practice, the business of supplying the equipment that makes such copyright feasible should not be stifled simply because the equipment is used by some individuals to make unauthorized reproductions. . . ."

[14] *See* Melville B. Nimmer & David Nimmer, 3 *Nimmer on Copyright* § 12.04[A] [1], at 12-72 to 12-74 (2004).

[15] In the Brief of Professors Peter S. Menell, David Nimmer, Robert P. Merges and Justin Hughes, as *Amici Curiae* in Support of Petitioners, it is suggested that "copyright law has long constrained technologies and business practices that jeopardize the system that supports creative expression," Menell Brief at 13-14, *citing Jerome H. Remick & Co. v. General Electric Co.*, 16 F.2d 829 (S.D.N.Y. 1926). (A partial list of briefs previously filed in this case and corresponding abbreviations appears as Appendix 1 to this brief.) However, this example fails to demonstrate the point for which it is offered. In the *General Electric* case, the challenge was offered not to the new technology of radio itself, but to a particular use to

(Continued on following page)

Nor is there any ambiguity about the meaning of this Court's response to that attempt, nor about the policy it was intended to fulfill. The language of the majority was clear and unambiguous in protecting technology notwithstanding infringing uses, based solely on the *possibility* of non-infringing ones: "[T]he sale of copying equipment, like the sale of other articles of commerce, does not constitute contributory infringement if the product is widely used for legitimate, unobjectionable purposes. Indeed, it need merely be capable of substantial noninfringing uses." 464 U.S. at 442.

A. The *Sony* principle strikes a balance between competing interests, rather than inviting further balancing in its application

Twenty years have passed since this Court's decision in *Sony*. But the clear and unambiguous principle announced in that case remains fully relevant. Several briefs filed in this case cite language of Justice Stevens' opinion for the proposition that, under *Sony*, the Ninth Circuit Court of Appeals should have but did not engage in some form of interest balancing before arriving at a conclusion on the issue of secondary liability.[16] In particular, these briefs rely on the statement that "[t]he staple article of commerce doctrine must strike a balance between a copyright holder's legitimate demand for effective – not merely symbolic – protection of the statutory monopoly, and the rights of others freely to engage in substantially

which broadcasters were putting that technology: the unlicensed broadcast of musical works. Far from being a challenge to (or resulting in a constraint on) technology, *General Electric* stands merely for the non-controversial proposition that when a multi-purpose technology is misused for purposes of copyright infringement, liability may result. For an extended critique of the Menell Brief and of the Arrow Brief, *see* Robert S. Schwartz & Mike Godwin, *Beyond Grokster – A Critique of the Models Proposed by Copyright and Law-And-Economics Authorities*, *available at* www.hrrc.org and www.publicknowledge.org/news/analysis/critique-menellet-rss-mg.

[16] *See, e.g.*, Film & Record Petitioners' Brief at 18, 21, 28; U.S. Brief at 7; State AG Brief at 10, 17.

unrelated areas of commerce." 464 U.S. at 442. This argument, however, misapprehends the essential nature of the *Sony* decision: The principle of immunity from secondary liability for providers of multi-use technologies is, in itself, the historically consistent *outcome* of a reasoned exercise in interest balancing, in which the private interest in control of copyrighted subject matter was weighed against the public and First Amendment interests in access to information technology. It should not be construed as a direction to engage in further balancing when applying the *Sony* principle.

B. The *Sony* principle applies generally to secondary liability for copyright infringement

In *Sony*, Justice Stevens noted that "[t]he District Court assumed that Sony had constructive knowledge of the probability that the Betamax machine would be used to record copyrighted programs. . . ." 464 U.S. at 426. Subsequently, he introduced the opinion's analysis of secondary liability by noting that *if* liability were to be imposed on the defendants, "it must rest on the fact that they have sold equipment with constructive knowledge of the fact that their customers may use that equipment to make unauthorized copies of copyrighted material." 464 U.S. at 439. The discussion that follows, however, rejected rather than embraced the potential for such "knowledge-based" secondary liability (whether the knowledge in question was actual or constructive) where providers of multi-purpose information technology are concerned. The *Sony* principle itself is intentionally devoid of any suggestion that the provider's state of mind is relevant in determining whether the technology "is capable of substantial noninfringing uses."[17] As Justice Stevens noted, even the

[17] *But see A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004, 1027 (9th Cir. 2001) (stating that *Sony* applies to the knowledge element of contributory infringement), which the Ninth Circuit followed in its decision below, *MGM Studios, Inc. v. Grokster, Ltd.*, 380 F.3d 1154, 1160-61 (9th Cir. 2004).

patent cases denied "any right to control the distribution of unpatented articles unless they are 'unsuited for any commercial noninfringing use.'" 464 U.S. at 441.[18] Only twelve years earlier, this Court had rejected arguments to extend domestic liability for inducing patent "infringement" overseas, without "a clear and certain signal from Congress." *Deepsouth Packing Co. v. Laitram Corp.*, 406 U.S. 518, 531 (1972).

This Court noted in *Sony* that the distinction between the two forms of secondary liability recognized in copyright law is often blurred in practice.[19] But, the policy rationale this Court articulated for limiting technology providers' liability applies with equal force to both forms, especially since claims invoking them typically are joined. Thus, the *Sony* principle is best understood as representing a general limitation on secondary liability as a whole.[20]

[18] Quoting *Dawson Chemical Co. v. Rohm & Haas Co.*, 448 U.S. 176, 198 (1980).

[19] [T]he District Court correctly observed [that] "the lines between direct infringement, contributory infringement and vicarious liability are not clearly drawn . . . ." The lack of clarity in this area may, in part, be attributable to the fact that an infringer is not merely one who uses a work without authorization by the copyright owner, but also one who authorizes the use of a copyrighted work without actual authority from the copyright owner.

> We . . . observe . . . that reasoned analysis of respondents' unprecedented contributory infringement claim necessarily entails consideration of arguments and case law which may also be forwarded under the other labels, and indeed the parties to a large extent rely upon such arguments and authority in support of their respective positions on the issue of contributory infringement.

Sony, 464 at 435, n.17 (citations omitted).

[20] *See In Re Aimster Copyright Litigation*, 334 F.3d 643, 654 (7th Cir. 2003) (Posner, J.): "[T]he Court, treating vicarious and contributory infringement interchangeably, see 463 U.S. at 435 and n.17, held that Sony was not a vicarious infringer either."

C. This Court should exercise extreme caution before importing new liability principles that are being developed under patent law in conflict with legislative intent

Within intellectual property, patent is the body of law that regulates technological innovation, while copyright regulates information use. Justice Stevens stated in *Sony* that patent law provided "the closest analogy" regarding the extent of contributory and vicarious liability under copyright law. 464 U.S. at 439. But it was no more than an analogy. Justice Stevens expressly warned that "[t]he two areas of the law, naturally, are not identical twins, and we exercise the caution which we have expressed in the past in applying doctrine formulated in one area to the other." 464 U.S. at 439 n.19. The *Sony* opinion thus rejected a call to extend copyright beyond its traditional scope, borrowing from patent law only the "staple article of commerce" concept and not any more expansive theory of secondary liability. Within copyright law, the staple article of commerce doctrine merely restates the clear principle that since the Statute of Anne has safeguarded information technology commerce from the owners of copyright monopolies.

1. The patent doctrine of "active inducement" is confused and confusing

Some have suggested that *Sony* might be revised by grafting onto it an exception for "active inducement" like that expressly provided in patent law. However, importing this doctrine into the different and distinct area of copyright law would be unwarranted judicial activism and would only serve to confuse a standard that has enjoyed nearly 300 years of consistency and reliability. While the *Sony* principle has been easily understood, uniformly applied, and generally respected in the field of copyright law, the patent law theory of active inducement has

been developed in contradiction of legislative intent and has proven to be confusing and difficult to apply.

Section 271(b) of the 1952 Patent Act, which imposes direct liability when a person "actively induces" infringement by another[21] was adopted in a deliberate legislative decision to clarify the prior law of contributory patent infringement, because of the confusion it had engendered. It was intended to create a special form of liability only when the inducer "aids and abets an infringement," and was distinguished from contributory infringement that is imposed for the knowing provision of non-staple articles of commerce.[22] Under traditional joint tortfeasance principles, however, aiding and abetting were understood to require a "substantial" encouragement for and support of the tort, rising almost to the level of "[c]oncert of action or conspiracy."[23] The mere knowledge that a tort might occur from the lawful provision of the means to commit it should never have resulted in liability under this standard.

Contrary to this Court's direction in *Deepsouth Packing Co.*, however, the lower courts have been inconsistently extending active inducement liability without statutory warrant,[24] burdening the courts and jeopardizing the

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[21] 35 U.S.C. § 271(b).

[22] H.R. Rep. No. 82-1928, at 9 (1952). *See id.* at 28 ("aiding and abetting"). *Cf.* 35 U.S.C. § 271(c); *Aro Mfg. Co. v. Convertible Top Replacement Co.*, 377 U.S. 476, 488 (1964) (requiring knowledge of the patent that proscribed the use to which the product was especially adapted).

[23] Dan B. Dobbs, *The Law of Torts* 936 (2000). *See id.* at 937-38; Restatement (Second) of Torts § 876(b), at 317 (Comment on Clause (b) ("the encouragement or assistance is a substantial factor in causing the resulting tort"). *Cf.* Restatement (Second) of Torts §§ 876(a) & (c) (1977) (requiring for "concert of action" either an "act in concert . . . pursuant to a common design" or "substantial assistance . . . constitut[ing] a breach of duty").

[24] *See* 406 U.S. at 531. The Federal Circuit first recognized that Congress had intended that active inducement should require the "proof of actual intent to cause the acts which constitute the infringement." *Hewlett-Packard Co. v. Bausch & Lomb*, 909 F.2d 1464, 1469 (Fed. Cir. 1990) (*citing Water Techs. v. Calco Ltd.*, 850 F.2d 660, 668 (Fed. Cir. 1988). Shortly thereafter, the Federal Circuit held that

(Continued on following page)

development of new or competing technologies. As one commentator recently stated, "the case law has not sparkled with clarity regarding precisely what the level of intent should be."[25]

2. The inappropriate importation of "active inducement" liability could create havoc in copyright law

As Justice Stevens noted in *Sony*, in contrast to the Patent Act, "[t]he Copyright Act does not expressly render anyone liable for infringement committed by another."[26] Under *Deepsouth Packing Co.*, this Court should not, without statutory guidance, import into copyright law "active inducement" liability in any form.[27] Such importation is

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inducement requires "that the defendant possessed specific intent *to encourage* another's *infringement* and not merely that the defendant had *knowledge* of the *acts* alleged to constitute inducement," but incautiously employed dicta indicating that inducement may be found on proof "that the alleged [inducer] . . . knew or should have known his actions would induce actual infringements." *Manville Sales Corp. v. Paramount Sys., Inc.*, 917 F.2d 544, 553 (Fed. Cir. 1990) (emphasis added). Thus, uncertainty exists as to whether there must be a specific intent beyond actual or constructive knowledge to cause acts constituting infringement and as to whether there must be a specific intent that the acts violate exclusive patent rights.

[25] John R. Thomas, *Of Text, Technique, and the Tangible: Drafting Patent Claims Around Patent Rules*, 17 J. Marshall J. Computer & Info. L. 219, 228 (1998). Another commentator stated flatly that the court had issued "conflicting decisions on the matter," which were "quite problematic for several reasons. . . . and that the Manville Sales opinion has created a great deal of confusion as to what the correct standard ought to be for intent under § 271(b). . . ." Michael N. Rader, *Toward a Coherent Law of Inducement to Infringe: Why the Federal Circuit Should Adopt the Hewlett-Packard Standard for Intent Under § 271(b)*, 10 Fed. Cir. B. J. 299, 314-16 (2000). *See also* Pasquale A. Razzano (ed.), *Conflicts in Federal Circuit Panel Decisions*, 11 Fed. Cir. B. J. 723, 755-64 (2001) (discussing conflicting cases as they relate to vicarious liability of corporate officers).

[26] 464 U.S. at 434.

[27] *See* 406 U.S. at 531. *Cf. Northwest Airlines, Inc. v. Transport Workers Union of Am.*, 451 U.S. 77, 97 (1981) ("The authority to construe a statute is fundamentally different from the authority to

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particularly unwarranted in light of the confusion resulting from extension of such liability in the patent context, where express statutory authority for active inducement liability exists, and where – if anywhere – such technology regulation is appropriate. Such a last-minute infusion of technology regulation into copyright jurisprudence could cause havoc with widely shared consumer expectations. For example, even though consumers may lawfully use a VCR to time shift a television program, will companies that supply an "Electronic Program Guide" that facilitates time shifting be threatened with suit for "active inducement" of infringement?[28] The record in this case is particularly ill-suited to be the basis for such a far-reaching overextension of the Copyright Act.

D. The *Sony* principle does not excuse all providers of multi-purpose information technology from liability, but it sets a traditionally high standard in such cases

Although this Court expressly limited the reach of secondary liability in *Sony*, providers of communication and information technology can be held liable when they act in concert with particular infringers. *Sony* neither

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fashion a new rule or to provide a new remedy which Congress has decided not to adopt.")

[28] Notably, major motion pictures studios already appear to have claimed as much, in litigation against the manufacturer of a personal video recorder, posing a threat to accustomed consumer electronics industry practices. *See* Testimony of Gary J. Shapiro, on behalf of the Consumer Electronics Association and the Home Recording Rights Coalition, before the United States Senate Committee on the Judiciary, *"An Examination of S. 2560, the Inducing Infringement of Copyrights Act of 2004,"* July 22, 2004, *available at* http://judiciary.senate.gov/testimony.cfm?id=1276&wit_id=3749 (describing a November 2001 complaint stating that solely via " 'The Seeking, Recording, Sorting and Storage Features' Defendants cause, accomplish, facilitate and *induce* the unauthorized reproduction of Plaintiffs' copyrighted works in violation of law") (emphasis added).

extended nor disavowed the existing law of secondary liability. That liability was based on traditional common-law joint tortfeasance principles, and should not be extended here.

1. Liability based on active concert explains the *Kalem* precedent discussed by this Court in *Sony*

A number of briefs filed in this proceeding refer, for various purposes, to this Court's decision in *Kalem Co. v. Harper Bros.*, 222 U.S. 55 (1911). The real significance of that decision, however, is intimately linked to its facts:

> The defendant employed a man to read Ben Hur and to write out [a scenario] giving enough of the story to be identified with ease. It then caused the described action to be performed, and took negatives for moving pictures of the scenes, from which it produced films suitable for exhibition. These films it expected and intended to sell for use as moving pictures in the way in which such pictures commonly are used. It advertised them under the title "Ben Hur". . . . It sold the films and public exhibitions from them took place.

Id. at 60-61. Considering the film production company as an information technology provider, supplying theaters with physical means (*i.e.* prints of the finished movie) of presenting unauthorized "performances" of the novel, a question arises as to why secondary liability for copyright infringement was found under these circumstances.

Under the current Copyright Act, the issue could not arise, since (in addition to facilitating the performances) *Kalem* would have violated various exclusive rights of the novel's copyright owner including the right "to prepare derivative works based upon the copyrighted work." 17 U.S.C. § 106(2). Under the 1891 version of the Copyright Act, applicable to *Kalem*, such a ground of liability was not

clearly available;[29] therefore, the litigants and this Court took an indirect approach to assigning responsibility to the film company for the course of activities (including the first and most critical) in which it was primarily implicated at every stage but the very last.[30] *Kalem* suggests that technology providers can be held secondarily liable in copyright infringement cases when and (in light of the history discussed above) only when they have knowingly acted in concert with infringers.[31]

2. The consistent application of the *Sony* principle since this Court's decision in 1984 has yielded findings of secondary liability in certain cases where concert of action was present

Although the general principle of *Sony* is clear, some courts have since found liability based on active participation in infringement. In such cases, defenses based on the *Sony* principle have failed far more often than they have succeeded. Courts have been scrupulous in distinguishing between cases involving the general provision of a multi-purpose technology on the one hand, and those in which technology suppliers were actively involved with known or suspected infringers – if not always themselves engaging

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[29] Copyright Act of 1891, ch. 565, § 4952, 26 Stat. 1107 (1891) (providing no adaptation right).

[30] The defendant not only expected but invoked by advertisement the use of its films for dramatic reproduction of the story. That was the most conspicuous purpose for which they could be used, and the one for which especially they were made. If the defendant did not contribute to the infringement it is impossible to do so except by taking part in the final act.

222 U.S. at 63.

[31] An alternative and more restrictive understanding of *Kalem* is that a technology provider should be secondarily liable only when the product it supplies is not capable of any noninfringing use (as the film of Ben Hur arguably could not be exhibited without violating the rights of the copyright owner).

in acts that technically would constitute direct infringement. Examples of decisions in which the *Sony* defense has failed include: *Columbia Pictures Industries, Inc. v. Redd Horne, Inc.*, 749 F.2d 154, 157 (3d Cir. 1984) (store employees transmitted requested programs to customers in viewing booths); *RCA/Ariola International, Inc. v. Thomas & Grayston Co.*, 845 F.2d 773 (8th Cir. 1988) (vendor helped customers use a specialized recording machine to duplicate copyrighted works); *A&M Records, Inc., et al. v. General Audio Video Cassettes, Inc.*, 948 F. Supp. 1449 (C.D. Cal. 1996) (vendors provided "time-loaded" cassettes of unusual lengths specifically to facilitate audiotape piracy); and *Adobe Sys. v. Southern Software*, 45 U.S.P.Q. 2d 1827 (N.D. Cal. 1998) (defendant actively cooperated in infringing use of software it supplied).

3. Given the narrow issue raised by the record below, the *Sony* principle is satisfied here

None of these situations of substantial involvement in infringement is analogous to the facts of the instant case, which fully satisfy the *Sony* principle. Notwithstanding the broad assertions in Petitioners' briefs and those of many *amici*, the record below is not replete with demonstrations that the Respondents acted hand-in-glove with infringers. This is particularly the case since the only issues before the Ninth Circuit (and hence before this Court) are those dealing with the "current versions" of the Grokster and Morpheus software, introduced in March 2002;[32] most of the asserted "bad acts" by Respondents date to the pre-March 2002 period.[33] Since that time, at least, Respondents appear to have maintained an arms-length

[32] *See MGM Studios, Inc. v. Grokster, Ltd.*, 259 F. Supp. 2d 1029, 1033 (C.D. Cal. 2003).

[33] The last e-mail between the defendants and their subscribers in which any information about downloading content is exchanged dates from March 19, 2002. *See* JA 945.

relationship with their subscribers and – at least insofar as the evidence summarized in the parties' Joint Appendix is concerned – to have avoided anything that could be characterized as concerted action. Nor is there any doubt that the Respondents' products had a "substantial noninfringing use," whether it amounted to only ten percent of the total, as Petitioners and *amici* supporting them contend, or to a larger fraction of the whole, as Respondents insist.[34]

4. The low level of post-*Sony* litigation derives from the clarity of that decision's core principle

As indicated in subparagraph 2, above, a review of the case law from 1984 to the beginning of the "peer-to-peer panic" reveals a number of instances in which a defense based on the *Sony* principle has been rejected because the defendant was properly seen as having substantial involvement in the infringing activities of another. There also has been a predictably small number of cases in which *Sony*-based defenses have been invoked successfully.[35] But the overall number of reported cases involving a *Sony*-based defense has remained remarkably low even as information technology has played an ever-larger part in copyright jurisprudence. Because *Sony* allows an action to lie against an information technology provider only in particular circumstances, copyright owners have chosen to enforce their rights against users instead. The clarity of the *Sony* principle has meant that, for most of two decades, our courts have not been burdened with claims

[34] The 90/10 division of uses appears to be based on a single expert declaration, *see* JA 478-79; it was not adopted as a finding of fact by the District Court, nor was it relied upon by the Ninth Circuit. *See Grokster*, 380 F.3d at 1158.

[35] *See, e.g., Vault Corp. v. Quaid Software Ltd.*, 847 F.2d 255 (5th Cir. 1988) (finding distribution of diskette that unlocked software security codes was not contributory infringement because technology had non-infringing uses for archival copying).

requiring complex factual inquiry and legal line-drawing around the permissibility and impermissibility of innovations in information technology.

5. By discouraging litigation, the clear *Sony* principle also facilitates the development of information and communications technology

The "bright line" principle that *Sony* restated so emphatically has been of incalculable value to the development of information technology (and the welfare of the consumers who depend upon it). Today, to a greater extent than ever before, the legal environment of copyright is riddled with pitfalls, and those who would negotiate it must exercise extreme care. Current provisions on "statutory damages" (of up to $150,000 for every *work* infringed) can act as a multiplier of any liability to which technology innovators may be exposed.[36]

In this climate, only the clear *Sony* principle, with its accurately foreseeable application to new circumstances, will adequately protect technology innovators and those who depend upon them. Under conditions of uncertainty, technology innovators will have no realistic alternative except to modify their products and services to meet the prior approval of copyright owners. That, in turn, will

[36] *See* 17 U.S.C. § 504(c). The $150,000 cap for each work infringed applies in cases of "willful" infringement. However, the threshold for showing that infringement was committed with actual or constructive knowledge of plaintiff's rights is not a particularly difficult one. *See, e.g., Yurman Design, Inc. v. PAJ, Inc.*, 262 F.3d 101 (2d Cir. 2001) (finding willfulness based on reckless disregard). Technology providers' potential exposure is great because modern information and communications tools are used to copy or transmits works by the thousands. *See, e.g., UMG Recordings, Inc. v. MP3.com*, 2000 U.S. Dist LEXIS 17907 (S.D.N.Y. 2000) (awarding statutory damages of $53.4 million against the operators of a misguided technology venture). *See generally* J. Cam Barker, *Note: Grossly Excessive Penalties in the Battle Against Illegal File-Sharing: The Troubling Effects of Aggregating Minimum Statutory Damages for Copyright Infringement*, 83 Tex. L. Rev. 525 (2004).

mean restricting otherwise lawful consumer uses of copyrighted works by modifying technologies to recognize repressive types of "digital rights management" controls.[37] The Brief of the United States as *Amicus Curiae* for Petitioners recognizes that imposition of a *de jure* "obligation to arrange one's product or relations in such a way as to permit the seller to retain control would have the undesirable effect of chilling technological innovation and constraining the product development choices of developers of software and other digital technologies." U.S. Brief at 20 n.3. However, the very modifications to the *Sony* principle for which the United States and other *amici* supporting Petitioners argue would bring about a similar result on a *de facto* basis.[38]

IV. Speculative and Untested Proposals for Modification of the Core Principle of *Sony* Put the Proper Relationship Between Copyright and Technology at Risk

Briefs already submitted in this case reveal a profusion of suggested approaches to revising the *Sony* principle. To cite a few examples, Petitioners advocate a standard that would look (in part) to whether a challenged technology is used "principally" for infringement (Film and Record Petitioners' Brief at 23), or would find liability where the provider of a multi-purpose technology has intentionally exploited instances of copyright infringement

[37] For the risks that digital rights management poses to "fair use" and other use privileges in copyright law, see Mike Godwin, *What Every Citizen Should Know About DRM a.k.a. "Digital Rights Management"* 31, *available at* www.publicknowledge.org/resources, and William W. Fisher III, *Promises to Keep: Technology, Law, and The Future of Entertainment* 152 (2004).

[38] *See* Testimony of Gary J. Shapiro, *supra* note 28, describing how changes in rules for secondary liability would "effectively force anyone hoping to come to market with a product that transmits or stores copyrighted works to negotiate *in advance*, to quiet *any* of the concerns of *any* copyright proprietor that has the resources to sue" (emphasis in original).

for purposes of profit (Music Petitioners Brief at 10-13); the United States would have the courts look to "the commercial significance to the defendant's business of the noninfringing use in comparison to the infringing use" (U.S. Brief at 17); the Progress and Freedom Foundation would focus on whether the defendant's "business practices" are "deliberately infringement-dependent" (PFF Brief at 10, 15); a group of teachers and scholars urges that, in determining secondary liability, courts consider the defendant's actual intent for the technology's use as opposed to its theoretical or potential uses, as well as (in a suggestion seconded by a number of other *amici*) the proportion of noninfringing uses to infringing ones as of the time of litigation (Professors' Brief at 8); some state Attorneys General advocate secondary liability when the defendant has knowingly and purposefully set in motion a business that profits from infringement or when the defendant has willfully blinded itself to the infringing activity perpetuated by the business (State AG Brief at 12-16); several *amici* urge adoption of the approach advocated in the Seventh Circuit's *Aimster* decision,[39] under which defendants would be secondarily liable if their technology promotes substantial infringing uses and they cannot show that it would be disproportionately costly for them to eliminate or to reduce substantially the infringing uses (Baseball Brief at 18, 22 and DPR Brief at 14-15); and others suggest either a balancing test such that where the infringing activity is sufficiently significant, the defendant should be found secondarily liable unless it has taken steps to curtail the infringement (Kids First Brief at 8-14) or one which would balance the harm to the copyright owners against adverse effects to consumers from the loss of the technology's noninfringing uses (Menell Brief at 24-29). None of these suggestions should be adopted.

[39] *In re Aimster Copyright Litig.*, 334 F.3d 643, 650 (7th Cir. 2003) (balancing of costs and benefits).

A. The proposed new standards would eliminate the salutary certainty provided by the *Sony* principle

These revisionist standards all are open-ended in articulation and unpredictable in application. Some depend on determinations of the subjective state of mind of technology providers, and many require courts to decide the issue of secondary liability based on a frozen "snapshot" of a rapidly evolving technological and commercial environment. Under many of these standards, changes in the market (such as an unanticipated shift from lawful to unlawful activities on the part of users) could negate the value of substantial prior investments. They would impose disproportionate burdens on technology providers, making them (in effect) guarantors of their customers overall good behavior, both in the present and the future.

Moreover, these standards are wholly untested in their potential application to providers of innovative information technology. For example, *Adobe Sys., Inc. v. Canus Productions, Inc.*, 173 F. Supp. 2d 1044 (C.D. Cal. 2001) – cited by the U.S. Brief at 15, 17 and 27 to exemplify a limiting reading of the *Sony* principle – did not involve providers of a new information technology (or any new technology). Rather, the defendant was a company that supplied space to consumer fairs at which straightforwardly infringing "pirated" software was sold. We cannot know to a certainty how the suggested modifications of the *Sony* principle would function in practice, but it is possible to speculate about the future by revisiting past episodes in which new technologies threatened the interests of copyright owners.

Had actions against technology providers based on some or all of these proposed standards been available to copyright owners at the time of the eighteenth century "technology panic" in the British book trade, the inevitable result would have been to slow, if not entirely to halt, the dissemination of the inexpensive print technology that was being supplied indiscriminately (and profitably) to established members of the publishing establishment and

renegade printers alike. Of necessity, the "business models" of printing press manufacturers and type founders depended on sales to the more marginal members of the trade – just as any modern enterprise plans for profitability by taking all possible revenues into account. The same is true of many technologies of freedom developed since.

B. This Court should not abandon the rigorous focus on regulating information use rather than information technology that helped the U.S. weather various "technology panics" of the modern era

In the 1870's, as the transmission of news by the new medium of telegraphy became a matter of increasing public interest and commercial concern,[40] disputes broke out between news organizations about the theft by telegraphy of valuable financial and other data. Eventually, these issues were resolved in decisions imposing sanctions on predatory *conduct* under the common law of misappropriation (both state and federal), while protecting this powerful technology and emphasizing that it was capable of both good uses and misuses.[41]

A few decades later, concerns were raised about widespread "piracy" carried on by means of new technology within the fledgling film industry. According to one authority, "[p]iracy in the film industry through the period lasting until near the onset of World War I was rampant. Most of it was committed by one film production company against another."[42] "As audiences grew tired of rival film

[40] *See* Tom Sandage, *The Victorian Internet: the Remarkable Story of the Telegraph and the Nineteenth Century's On-Line Pioneers* 148-152 (1998).

[41] *See International News Service v. Associated Press*, 248 U.S. 215 (1918). An earlier decision of special interest is *Kiernan v. Manhattan Quotation Telegraph Co.*, 50 How. Prac. Rep. 194 (S. Ct. N.Y. 1876).

[42] Kerry Segrave, *Piracy in the Motion Picture Industry* 28 (2003).

versions of Niagara Falls ... and so forth, producers turned to comic episodes and then began to steal each other's plots ... made 'dupes,' and sold them under new titles."[43] Production companies enthusiastically participated in infringing practices, especially when competitors failed to register their copyrights.[44] In addition to competitors' plots, production companies based films on newspaper stories and comics[45] as well as a range of literary sources.[46] Some early film producers brought lawsuits against others who copied from or duplicated their works.[47] But it was not until this Court's 1911 decision in the *Kalem* case that intellectual property law was deployed to discipline the creative side of this unruly young industry. That discipline consisted of regulating *how* technology could be used in the film industry, not *what* technology could be used.

In the 1920's, the new technology of radio threatened a music industry whose income depended on live performances, sheet music sales and (increasingly) the distribution of mechanical sound recordings. The capability of radio to broadcast live and pre-recorded music to large audiences put all of these sources of revenue at risk. So, as one authority of the history of the music industry put it, "[m]any people believed that the record companies were really more interested in terminating all radio-station use of records than in collecting fees."[48] At the behest of the industry, the federal government set a policy of "grant[ing]

[43] *Id.* at 25.

[44] *See id.* at 25-26. *See also* Charles Musser, *Before the Nickelodeon* 421 (1991).

[45] *See Musser, supra* note 44, at 162-67.

[46] *See* Eileen Bowser, *The Transformation of Cinema, Volume 2: 1907-1915*, at 256 (1990).

[47] *See, e.g., American Mutoscope & Biograph Co. v. Edison Mfg. Co.*, 137 F. 262 (C.C.D.N.J. 1905); *Edison v. Lubin*, 122 F. 240 (3d Cir. 1903); and *Barnes v. Miner*, 122 F. 480 (C.C.S.D.N.Y. 1903).

[48] Russell Sanjek III, *American Popular Music and Its Business: The First Four Hundred Years (From 1890 To 1984)* 144 (1988).

broadcast licenses only to stations that promised not to play records [although] practically speaking most stations never really stopped playing them."[49] In the end, of course, the interest groups compromised with a system of collective licenses for the broadcast performance of music, utilizing organizations like ASCAP and BMI. This resolution, and the benefits it has bestowed on the industry and the public at large, would never have come about had music companies been able to enjoin a critical part of the new medium's potential functionality. Under the principle of secondary liability that would receive its fullest articulation in *Sony*, however, they could not do so; at best, they could (and did) attack the misuse of technology by radio stations that broadcast music without licenses.[50]

C. The regulatory focus embodied in *Sony* has helped to promote cultural progress in our era

Forty years ago, photocopying was the focus of yet another "technology panic." The 1935 "Gentlemen's Agreement" (or "Reproduction of Materials Code") negotiated between libraries and publishers was breaking down under the pressure of technological change, "in large measure because of the volume of photocopies made possible by the Xerox photocopier."[51] Experts were predicting dire consequences for authors and the copyright

[49] Mark Coleman, *Playback* 34 (2003).

[50] *See* the discussion of *Jerome H. Remick & Co. v. General Electric Co.* in note 15, *supra*.

[51] Laurie C. Tepper, *Copyright Law and Library Photocopying: An Historical Survey*, 84 Law Lib. J. 341, 348 (1992). *See also* Louise Weinberg, *The Photocopying Revolution and the Copyright Crisis*, 38 Pub. Interest 99 (1975). For the Xerox 914 that spearheaded the "revolution," see David Owen, *Copies in Seconds: Chester Carlson And The Birth Of The Xerox Machine* 245-257 (2004).

system in general.[52] Significantly, however, in all the arguments about photocopying that occurred in the years preceding the general revision of U.S. copyright law in 1976, publishers never suggested that the technology itself should be modified (or access to it regulated) to reduce the threat to their revenues. Not only did the social benefits of photocopying technology put such an approach practically and politically out of reach, but the traditions of copyright law offered no support for it. Publishers could and did challenge the *use* of photocopies in libraries, schools and businesses,[53] but the technology itself was sacrosanct.

Ultimately, the "photocopying panic" was resolved by a mixed solution, including legislative clarification of the scope of "fair use," provision for ongoing supervision of library photocopying practices, and – crucially – the creation of a private mechanism (the "Copyright Clearance Center") for the collective administration of copyright owners' rights in the field of reprography.[54] This latter feature parallels the creation of the performing rights organizations that mediated the end of the crisis provoked by radio broadcast of the recording music.

Although there are credible, well-developed proposals for a similar resolution to our contemporary "peer-to-peer panic,"[55] the copyright industries have so far preferred to litigate rather than to negotiate. Technological responses

[52] *See* Melville B. Nimmer, *New Technology and the Law of Copyright: Reprography and Computers*, 15 UCLA L. Rev. 931, 951 (1968).

[53] *See, e.g., Williams & Wilkins Co. v. United States*, 487 F.2d 1345 (Ct. Cl. 1973), *aff'd by an equally divided Court*, 420 U.S. 376 (1975) (upholding library photocopying as "fair use"); *Basic Books, Inc. v. Kinko's Graphics Corp*, 758 F. Supp. 1522 (S.D.N.Y. 1991) (finding commercial photocopying service liable for direct infringement for photocopying); *American Geophysical Union v. Texaco, Inc.*, 60 F.3d 913 (2d Cir. 1984) (holding business corporation liable).

[54] For the elements of this solution, see Paul Goldstein, *Copyright's Highway* 109-17, 207-207 (rev. ed. 2003).

[55] *See* Fisher, *supra* note 37, at 199-258 (describing a statutory "alternative compensation system").

by content proprietors may proceed through several iterations and phases – a process with which courts should feel loathe to interfere. In the early 1980's, music copyright owners were the first to profit from consumer digital technologies by launching pre-recorded products in the Compact Disc ("CD") format (invented and introduced by Sony and Philips). Later in the same decade, when they saw Digital Audio Tape recorders as a threat, music publishers filed suit against Sony for introducing this product as well.[56] They then negotiated and secured passage of the Audio Home Recording Act,[57] and the suit was dismissed.[58] When personal digital music players were introduced, music interests then filed and lost a suit under the AHRA.[59] They then began to apply "anti-copy" technology to control "ripping" from CD's,[60] and to license new formats in which the digital audio is encrypted.[61] Finally, as a parallel with what occurred in the VCR market, they began to offer paid music services, such as *iTunes*, to take advantage of the market for portable music players – the very market that was established by the technology they initially sought to control. These developments were possible because, under the *Sony* principle, these multi-purpose consumer technologies could not be suppressed.

[56] Philips also introduced a product of concern to the music industry, the first CD recorder. *See Philips To Launch First Audio CD Recorder*, Reuters, June 25, 1997, *archived at* www.minidisc.org/philips_rec_cd.html.

[57] 17 U.S.C. §§ 1001-1010.

[58] *See* S. Rept. 102-294, at 32-33 (1992).

[59] *See RIAA v. Diamond Multimedia Systems, Inc.*, 180 F.3d 1072 (9th Cir. 1999).

[60] *See, e.g.*, Tony Smith, *Macrovision preps '99% effective' CD lock-in tech*, July 24, 2004, *available at* www.theregister.co.uk/2004/07/26/macrovision_cds300_7/.

[61] *See, e.g.*, Alan Lofft, *Is DVD-Audio or Super Audio CD In Your Future?*, *available at* www.axiomaudio.com/archives/DVDA.html.

D. Dilution of the *Sony* principle will not significantly diminish the use of peer-to-peer software for unlawful file sharing

None of the reformulations or reinventions of the *Sony* principle proposed by Petitioners and their *amici* is likely to make a substantial dent in unlawful file sharing over the Internet. Petitioners in effect concede that the relief they seek will have largely symbolic value when they argue that "reversing the Ninth Circuit is necessary to restore a climate of appropriate respect for intellectual property on the Internet . . . ." Film and Record Petitioners' Brief at 20. The brief of the State Attorneys General likewise urges the Court to adopt a rule that "will send an important signal." State AG Brief at 1-2.

Recalibration of the *Sony* principle would provide little practical relief for Petitioners. P2P software would remain available from off-shore distributors beyond the reach of U.S. copyright law, in countries where domestic copyright law does not recognize or enforce doctrines of secondary liability.[62] Last year this Court recognized that laws regulating conduct on the Internet tend to be ineffective, at least under the current state of technology, "because providers of the materials covered by the statute can simply move their operations overseas." *Ashcroft v. ACLU*, 124 S. Ct. 2783, 2786 (2004).

The signal most likely to be sent by the reinvention of *Sony* would be that it is time for bad actors to move offshore where they can continue to reach the U.S. market with impunity. But legitimate U.S. technology companies, with millions of domestic employees, will experience the chilling effect of exposure to uncertain new liability. Innovation will decline and consumer prices will rise. Competition with India and China will become more difficult, and more U.S. jobs will be shipped overseas. Accordingly, an accurate

[62] *See* Sam Yagan, *Peer-to-Peer Politics*, Daily Variety, June 30, 2004, at 15 (describing Earthstation 5 P2P service headquartered in Palestinian territory).

cost-benefit analysis in this case will reveal that the costs resulting from a reinterpretation of *Sony* far outweigh any possible benefits.

If the Court leaves the *Sony* principle undisturbed, as it should, Respondents will not necessarily escape liability. It remains open to the district court to find them liable for copyright infringement based on action in concert involving the prior release of their software. That would send a real signal to those who do not respect the intellectual property laws on the Internet.

CONCLUSION

By enabling the development and distribution of successive "technologies of freedom," the principle embodied in this Court's *Sony* decision has helped to generate enormous public benefits while assuring fair and reasonable compensation to copyright owners. Modifying the *Sony* principle would provide copyright owners with a roving commission to censor new information technology. This Court should not vest control over information technology in the modern-day equivalent of the Stationers' Company. In the short term, the benefits of such a departure would accrue exclusively to the copyright industries, and the costs would accrue to the public. In the longer term, all would share in the resulting cultural, economic and social losses.

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APPENDIX 1

Selected briefs and abbreviations

- ASCAP (American Society of Composers, Authors and Publishers) et al. (Amici Curiae in Support of Petitioners) ["ASCAP Brief"]
- Commissioner of Baseball et al. (Amici Curiae in Support of Petitioners) ["Baseball Brief"]
- Defenders of Property Rights (Amicus Curiae in Support of Petitioners) ["Defenders Brief"]
- Kids First Coalition et al. (Amici Curiae in Support of Petitioners) ["Kids First Brief"]
- Law Professors, Economics Professors and Treatise Authors (Amici Curiae in Support of Petitioners) ["Professors' Brief"]
- Motion Picture Studios & Recording Companies (Petitioners) ["Film and Record Petitioners' Brief"]
- Professors Menell, Nimmer, Merges, and Hughes (Amici Curiae in Support of Petitioners) ["Menell Brief"]
- Progress and Freedom Foundation (Amicus Curiae in Support of Petitioners) ["PFF Brief"]
- Songwriters & Music Publishers (Petitioners) ["Music Petitioners' Brief"]
- State Attorneys General (Amici Curiae in Support of Petitioners) ["State AG Brief"]
- United States of America (Amicus Curiae in Support of Petitioners) ["U.S. Brief"]